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HAWAI'I CIVIL RIGHTS COMMISSION

STATE OF HAWAI'I

In the Matter of PETITION TO AMEND HAW. ADMIN. R. §§12-46-109(c) and (d) and 12-46-175(d), HAWAII EMPLOYERS COUNCIL, Petitioner,	Rule Relief Docket No. 06-001 HAWAII EMPLOYERS COUNCIL'S STATEMENT ADDRESSING EXECUTIVE DIRECTOR'S MEMORANDUM IN THE MATTER OF PETITION FOR RULE RELIEF

HAWAII EMPLOYERS COUNCIL'S STATEMENT ADDRESSING EXECUTIVE DIRECTOR'S MEMORANDUM IN THE MATTER OF PETITION FOR RULE RELIEF

Pursuant to this Commission's Order dated March 23, 2006, the undersigned Petitioner, Hawaii Employers Council ("HEC" or "Petitioner") submits the following statement addressing the matters raised in the Executive Director's Memorandum In The Matter Of Hawaii Employers Council's Petition For Rule Relief.

The arguments raised by the Executive Director's Memorandum in opposition to the Petition mischaracterize Hawaii and federal law on employer liability for discriminatory harassment by supervisory employees, and misapprehend HEC's arguments in favor of the Petition.

First, the Executive Director fails to explain why HEC's Petition is so faulty that as an initial matter it should not even be considered for public comment and hearing, pursuant to Haw. Admin. R. §12-46-82(b)(2). Second, although Hawaii law on employment discrimination admittedly differs in some respects from federal law, nothing in Hawaii Revised Statutes Chapter 378 indicates that the Hawaii legislature intended to hold employers strictly liable for all harassment by supervisors, and no reported Hawaii appellate decision has ruled on the issue.

Third, although the Executive Director argues that Haw. Admin. R. §§12-46-109(c), 12-46-109(d), and 12-46-175(d), are "well-established Hawaii law," the mere fact that administrative rules have been in existence for some time does not mean that the Commission must ignore the legitimate reasons advanced by Petitioner for their amendment. Fourth, the Executive Director errs in contending that Petitioner's amendments would create a less protective standard for supervisor harassment than under federal law. Petitioner does not argue that a negligence standard should apply to all supervisor harassment, and the Executive Director fails to offer any valid support for his argument that elimination of subparts 12-46-109(c), 12-46-109(d), and 12-46-175(d) will have that effect.

Finally, the Executive Director's allegation that "the proposed amendments to Hawaii law would diminish the recognized remedial purposes of Hawaii's anti-discrimination laws" improperly elevates the remedial purpose of the statute over its deterrent and conciliatory purposes, and ignores the admonition in the Commission's own rules that that "[p]revention is the best tool for the elimination of sexual harassment." Haw. Admin. R. §12-46-109(g). The decisions of the U. S. Supreme Court in Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998) struck a careful balance between providing adequate remedies for supervisor harassment, while providing incentives for

employers to eliminate harassment through the promulgation of appropriate policies, complaint procedures, training for supervisors and employees, and other preventive and corrective measures. The same balance should, at the very least, be considered by the Commission through public rulemaking.

I. The Petition Contains Sufficient Reasons Justifying Public Rulemaking

The Hawaii Administrative Rules provide that after the submission of a petition for rulemaking, an agency "shall within thirty days either deny the petition in writing, stating its reasons for the denial or initiate proceedings in accordance with section 91-3." In turn, the HCRC's rules governing rulemaking provide as follows:

> §12-46-82 Disposition. (a) The commission, within the time permitted by chapter 91, HRS, shall either deny the petition further consideration, or initiate public rulemaking procedures in accordance with this subchapter and chapter 91, HRS.
> (b) Without limiting the generality of the foregoing, the commission may deny any petition which:
> (1) Fails to substantially conform with the requirements of section 12-46-81;
> (2) Discloses no sufficient reasons justifying the institution of public rulemaking procedures; or
> (3) Is frivolous.

The Executive Director contends that the Petition "[d]iscloses no sufficient reasons justifying the institution of public rulemaking" pursuant to §12-46-82(b)(2). This attempt to preempt a public hearing and public debate should be rejected by the Commission. Petitioner relies, *inter alia*, on the cogent analysis of employer liability for supervisor harassment contained in the United States Supreme Court's decisions in Faragher and Ellerth, the deterrent and conciliatory purposes of Hawaii Revised Statutes Chapter 378 which are promoted by the affirmative defense, the numerous state court decisions which have recognized the affirmative defense, and the doctrine of avoidable consequences which has been firmly established under Hawaii law. Moreover, as noted in the Petition, there is nothing in either the plain language of

Chapter 378 or its legislative history which indicates that the Hawaii legislature intended to hold employers strictly liable for all discriminatory harassment by supervisors. In fact, because of the absence of support in the language or legislative history of Chapter 378, the provision in Haw. Admin. R. §§12-46-109(c) and 12-46-175(d) which holds employers liable for harassment by supervisors "regardless of whether the specific acts complained of were authorized or even forbidden, and regardless of whether the employer or other covered entity knew or should have known of their occurrence" is potentially *ultra vires*, and may be in derogation of the rulemaking authority conferred upon the Commission by the Legislature.

However, at this stage of the proceedings, HEC is merely requesting that the Commission entertain the Petition, and open the matter to public rulemaking. The Commission is not required to, and should not, make a final determination at this time as to whether the proposed amendments are justified. HEC anticipates that if a public hearing is held, employers, employees, the plaintiffs' bar, and the defense bar will offer strong views on the proposed amendments. The purpose of public rulemaking is to allow vigorous public debate and commentary so that the Commission can make an informed decision on the merits. Petitioner welcomes this process, because it promotes transparency in government, and offers an open forum for stakeholders to voice their concerns. Given the United States Supreme Court's analysis of liability for supervisor harassment in Faragher and Ellerth, the Equal Employment Opportunity Commission's (hereafter "EEOC's") elimination of federal rules which are virtually identical to the Hawaii rules at issue, and numerous decisions from other state courts recognizing the affirmative defense for supervisor liability, it is difficult to fathom how the Executive Director can contend that the Petition fails to advance sufficient reasons for instituting public rulemaking.

II. Hawaii Courts Have Followed Title VII Jurisprudence Unless Hawaii Law Dictates A Different Result

The Executive Director correctly observes that in some respects, Hawaii anti-discrimination law differs from federal Title VII, which formed the basis for the Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998) and Faragher v. City of Boca Raton, 524 U.S. 775 (1998). However, the Executive Director clearly errs in stating that "Petitioner asserts inaccurately that Hawai'i courts have 'traditionally looked for guidance to federal law under Title VII when interpreting Hawai'i discrimination law'." Executive Director's Memorandum, p. 4. It cannot be disputed that Hawaii courts have traditionally looked for guidance to federal court decisions interpreting Title VII, unless a relevant provision of Hawaii's employment discrimination law differs from Title VII. As the court explained in Furukawa v. Honolulu Zoological Society:

> The federal courts have considerable experience in analyzing these cases, and we look to their decisions for guidance. But, as the California Supreme Court recently observed, federal employment discrimination authority is not necessarily persuasive, particularly where a state's statutory provision differs in relevant detail.

85 Haw. 7, 13, 936 P.2d 643, 649 (1997) (emphasis added). In Sam Teague, Ltd. v. Hawai'i Civil Rights Commission, the court stated:

> Initially, we note that Hawai'i's employment discrimination law was enacted to provide victims of employment discrimination the same remedies, under state law, as those provided by Title VII of the Federal Civil Rights Act of 1964. Hse. Stand. Comm. Rep. No. 549, in 1981 House Journal, at 1166; Sen. Stand. Comm. Rep. No. 1109, in 1981 Senate Journal, at 1363. Accordingly, the federal courts' interpretation of Title VII is useful in construing Hawai'i's employment discrimination law.

89 Haw. 269, 281, 971 P.2d 1104, 1116 (1999) (emphasis added). Likewise, in Shoppe v. Gucci America, Inc., 94 Haw. 368, 377, 14 P.3d 1049, 1058 (2000), the court stated:

> In interpreting HRS §378-2 in the context of race and gender discrimination, we have previously looked to the interpretation of analogous federal laws by the federal courts for guidance. Furukawa v. Honolulu Zoological Soc'y, 85 Haw. 7, 13, 936 P.2d 643, 649 (1997) ("The federal courts have considerable experience in analyzing these cases, and we look to their decisions for guidance."); *see also* Sam Teague, Ltd. v. Hawai'i Civil Rights Comm'n, 89 Haw. 269, 279 n.10, 971 P.2d 1104, 1114 n.10 (1999) (citation omitted). We have also recognized, however, that federal employment discrimination authority is not necessarily persuasive, particularly where a state's statutory provision differs in relevant detail.

94 Haw. 368, 377, 14 P.3d 1049, 1058 (2000) (emphasis added). Petitioner invites the Commissioners to read the foregoing cases, and determine for themselves whether it is the Petitioner's or the Executive Director's characterization of Hawaii law which is inaccurate.

The Hawaii Supreme Court has held that in determining the appropriate weight to be given to federal precedent, the question is whether Hawaii's statutory provisions (and *not* the HCRC's administrative regulations) differ "in relevant detail" from Title VII. Shoppe, 94 Haw. at 377, 14 P.3d at 1058 ("federal employment discrimination authority is not necessarily persuasive, particularly where a state's statutory provision differs in relevant detail"); Furukawa, 85 Haw. at 13, 936 P.2d at 649 (same). In arguing that the Commission should not follow federal precedent under Title VII, the Executive Director has failed to cite to any statutory provision in Chapter 378 which differs in relevant part from Title VII, or which indicates the Legislature intended to hold employers strictly liable for all supervisory harassment. The fact that the Hawaii Supreme Court in Nelson v. University of Hawai'i, 97 Haw. 376, 38 P.3d 95 (2001) recognized a slight difference between the elements of a hostile work environment harassment claim under Hawaii law as compared with federal law is irrelevant. Petitioner's request is not addressed to the elements of a hostile work environment claim, but rather concerns the standard of liability for supervisory harassment.

It is particularly important to recognize that the court in Sam Teague specifically held that "Hawai'i's employment discrimination law was enacted to provide victims of employment

discrimination the same remedies, under state law, as those provided by Title VII of the Federal Civil Rights Act of 1964." 89 Haw. at 281, 971 P.2d at 1116 (emphasis supplied). There is no indication in either Chapter 378 or the legislative history of Hawaii's employment discrimination laws that the Legislature intended state discrimination law to provide greater or more extensive remedial relief for supervisory harassment than that existing under Title VII. .

Both Title VII and Haw. Rev. Stat. Chapter 378 lack any language specifically addressing employer liability for supervisor harassment. In the absence of a Congressional directive regarding employer liability for supervisor harassment, the Supreme Court in Faragher and Ellerth established a reasoned framework which balances the need to provide a remedy for injuries arising from supervisory harassment against the principle that employers should not be held liable for conduct which they have expressly prohibited and have provided reasonable complaint procedures to address. When an employer informs employees that sexual harassment is prohibited and takes other appropriate preventive measures, provides reasonable complaint procedures for complaints of harassment, and deals severely with transgressors so as to prevent future occurrences, it is clearly reasonable to require employees affected by unlawful harassment to avoid injury by utilizing the employer's complaint process.

Finally, the equal protection provision of the Hawaii Constitution, Article I, Section 5, which states that no person shall be "denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry" is merely a limitation on state action by governmental actors. Baehr v. Lewin, 74 Haw. 530, 584-585, 852 P.2d 44, 69 (1993) (noting that under Article I, Section 5, "any State action against a person because of his or her 'sex' is subject to strict scrutiny"); Leong v. Hilton Hotels Corp., 698 F. Supp. 1496, 1503 (D. Haw. 1988) (holding that Article I, Section 5 applies "only to state action,

not private action"). Because it is a limitation on state action, Article I, Section 5 is not specifically addressed to employment discrimination by private employers, and is not a mandate for stronger enforcement of Hawaii's civil rights laws. No reported Hawaii appellate decision has cited the equal protection provision of the Hawaii Constitution as a basis for enforcing Hawaii's employment discrimination laws more vigorously than enforcement under Title VII.

III. The Mere Fact That Regulations Have Been In Existence For Over 15 Years Is No Basis For Ignoring Legitimate Grounds For Their Amendment

The third argument raised by the Executive Director is that because the HCRC regulations at issue have been in existence for a long time, "[f]ifteen years of settled Hawai'i law cannot simply be brushed aside through rulemaking as requested by the Petitioner." Executive Director's Memorandum, p. 6. This argument should be rejected, because the mere longevity of an administrative regulation does not mean that it constitutes a proper interpretation of the law, particularly where, as in this case, the Hawaii Supreme Court has never analyzed or ratified the regulation. Although the Executive Director cites to HCRC contested case decisions holding employers strictly liable for supervisor harassment, no reported Hawaii case has ever ruled that the HCRC regulations holding employers strictly liable for all forms of supervisory harassment carries out the Legislature's intent, or is a valid exercise of the Commission's rulemaking authority.

The Executive Director attempts to mislead the Commission by claiming that in Steinberg v. Hoshijo, 88 Haw. 10, 960 P.2d 1218 (1998), "the Hawai'i Supreme Court affirmed the Commission's finding of liability where the employer had no knowledge of the harassment and where the employee admitted she had not complained about the harassment." Executive Director's Memorandum at p.7. In fact, the Hawaii Supreme Court in Steinberg clearly never considered the issue of whether Kailua Family and Urgent Medical Care, the defendant's

employer, should be held liable for the conduct of defendant Steinberg, a supervisory employee. The employer in Steinberg had already settled and was dismissed from the case before the Commission even issued its decision. The court in Steinberg stated:

> On September 25, 1996, the HCRC heard oral argument from counsel for Dr. Steinberg and counsel for the Executive Director. (Just a few days prior to oral argument, the Executive Director and Dr. Simich reached a settlement prompting the Executive Director to request that the HCRC dismiss Dr. Simich, formerly d.b.a. Dr. Robert L. Simich and Associates, also formerly d.b.a. Kailua Family and Urgent Medical Care, from the case.)

88 Haw. at 14, 960 P.2d at 1222 (parentheses in original). Because the employer settled before the case even reached the court, the court in Steinberg had no occasion to consider the issue of whether the employer should be held strictly liable for Dr. Steinberg's conduct.

Similarly, the Hawaii Supreme Court never ruled on the issue of supervisor liability in Gonzalves v. Nissan Motor Corp., 100 Haw. 149, 58 P.3d 1196 (2002) as the Executive Director claims at p. 8 of his Memorandum. Gonzalves involved a suit by Leland Gonzalves, a former supervisor, against his employer, Nissan Motor Corporation, after he was terminated because Nissan determined that he had engaged in sexual harassment towards Neldine Torres, one of his subordinates. The majority opinion in Gonzalves never discussed, and certainly never ratified Haw. Admin . R. §12-46-109(c), which purports to hold employers strictly liable for supervisor harassment. In fact, rather than concluding that Nissan was strictly liable for the harassment perpetrated by its supervisor, Gonsalves, the Hawaii Supreme Court stated that Nissan would only potentially be liable for Gonzalves' harassment of his subordinate after it received notice of the harassment:

> Gonsalves, unlike Torres, was a supervisor and could be considered Nissan's agent. Once Nissan had notice of Torres's allegations against Gonsalves, Nissan was potentially liable for future sexual harassment. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 802, 141 L. Ed. 2d 662, 118 S. Ct. 2275 (1998); Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765, 141 L. Ed. 2d 633, 118 S. Ct. 2257 (1998).

Gonsalves, 100 Haw. at 161, 58 P.3d at 1208 (emphasis supplied). Contrary to §12-46-109(c), the Hawaii Supreme Court concluded that Nissan's liability depended upon whether it had notice of its supervisor's harassment. Rather than supporting the Executive Director's position, the Court's citation to Faragher and Ellerth indicates it would follow those decisions in holding that employers are not strictly liable for supervisory harassment, unless the harassment involves a tangible employment action. *Id.* The Executive Director's reference to Justice Acoba's dissenting opinion in Gonsalves is unavailing, because (1) it is a minority opinion by a single justice, and (2) Justice Acoba merely approved of the HCRC's position on supervisor liability without analysis.

The Executive Director's reliance Arquero v. Hilton Hawaiian Village LLC, 104 Haw. 423, 91 P.3d 505 (2004) is likewise misplaced. The plaintiff in Arquero was a waitperson who was harassed by a co-worker, not a supervisor. The court in Arquero never considered the issue of employer liability for supervisor harassment. The court merely quoted Haw. Admin. R. §12-46-109 in its entirety, while noting that courts must "look at the record as a whole, and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred." 104 Haw. at 9-10, n. 7, 91 P.3d at 1217-1218, n. 7. Because the issue of employer liability for supervisor harassment was never at issue in Arquero, the decision neither implicitly nor explicitly approves of Haw. Admin. R. §§12-46-109(c) and (d).

IV. The Petition Does Not Seek A Lower Standard Of Liability Than That Currently Imposed By Federal Law

Nothing in HEC's Petition suggests that it seeks to impose a lower standard of liability on employers than the standard existing under federal Title VII. Although the Executive Director claims that Petitioner has made inaccurate representations regarding the effect of the requested amendments, it is the Executive Director's representations which are misleading. The Executive

Director argues that by eliminating Haw. Admin. R. §12-46-109(c) and part of 12-46-109(d), the Commission will "convert employers' liability to the simple notice-based negligence standard," and complains that the proposed amendments fail to include proposed language holding employers strictly liable for supervisor harassment resulting in a "tangible employment action." Executive Director's Memorandum, p. 10.

The Executive Director's parade of horrors is based on a faulty premise. The Executive Director presupposes that unless liability is expressly spelled out in the HCRC's administrative rules, no liability exists. This supposition ignores the obvious fact that much of both federal and state discrimination law is based on principles which have been judicially established by the courts, rather than through statutes or by rulemaking. For example, Hawaii courts have adopted the elements of a plaintiff's *prima facie* case of discrimination and the framework for proving discrimination judicially established by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), a case arising under Title VII. *See, e.g.*, Hac v. University of Hawaii, 102 Haw. 92, 101-102, 73 P.3d 46, 55-56 (2003) ("[t]his court has adopted the *McDonnell-Douglas* analysis in HRS §378-2 discrimination cases").[1]

In the absence of explicit statutory language or agency regulations, the Commission itself has relied on both its own interpretations of the law or on judicial decisions to flesh out liability principles under state discrimination law. For example, in Petitioner v. Linda C. Tseu, Docket No. DR 92-003 (order granting petition for declaratory relief) (1992), this Commission determined that under Hawaii law, "sex-differentiated hair length standards do not per se

[1] More recently, in French v. Pizza Hut, Inc., 105 Haw. 462, 468, 99 P.3d 1046,1052 (2004), the court Hawaii Supreme Court further relied on federal case law in analyzing violations of Hawaii disability discrimination law, stating "we adopt the analysis for establishing a prima facie case of disability discrimination under HRS §378-2 that was established in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 119 S. Ct. 2139, 144 L.Ed.2d 450 (1999)."

constitute discrimination based upon sex," although there is no explicit statutory provision or regulation concerning employer grooming standards.

More importantly, although the HCRC has promulgated regulations on discrimination based upon sex, marital status, age, religion, ancestry, and disability, (see Haw. Admin. R. §§12-46-101 to 12-46-193), there are no HCRC regulations directed to discrimination based on sexual orientation, color, or arrest and court record. Similarly, although Haw. Admin. R. §§12-46-109(c) and 12-46-175(d) purport to impose strict liability on employers for supervisor harassment based on sex and ancestry (respectively), there are no regulations whatsoever addressing employer liability for harassment based upon age, religion, disability, or sexual orientation.[2] Yet the Executive Director obviously does not contend that the absence of such regulations means that employers are absolved from liability for workplace harassment based upon age, religion, disability, or sexual orientation.

Petitioner has not suggested express language regarding employer liability for tangible employment actions because Petitioner believes the HCRC should track the amendments made by the EEOC in conforming its own regulations to the U.S. Supreme Court's decisions in Faragher and Ellerth. *See* 64 Fed. Reg. 58333-34 (Oct. 29, 1999), attached as Appendix "C" to HEC's Petition. Rather than codifying a definition of "tangible employment action," the EEOC eliminated the regulations providing that employers are responsible for sexual and national origin harassment by agents and supervisors "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence." *Id.*; *see also* former 29 C.F.R. 1604.11(c) (1998); 20 C.F.R. §1606.8(c), attached to HEC Petition at Appendices "A" and "B." Because the Hawaii

[2] *See* Haw. Admin. R. §§12-46-131 to 12-46-139 (age); §§12-46-151 to 12-46-157 (religion); §§12-46-181 to 12-46-193 (disability). As noted above, there are no HCRC regulations regarding sexual orientation.

Supreme Court has recognized that the EEOC's regulations on harassment "are nearly identical to Hawaii's regulations," Nelson v. University of Hawai'i, 97 Haw. 376, 388, 38 P.3d 95, 107 (2001), Petitioner sees no reason to diverge from the federal model, and the Executive Director fails to explain why such divergence is mandated by Chapter 378.[3]

V. Adoption Of The Faragher/Ellerth Defense Will Not Only Increase Employer Incentives To Prevent And Correct Workplace Harassment, But Will Effectuate The Doctrine Of Avoidable Consequences Recognized Under Hawaii Law

The Executive Director makes various flawed arguments in the course of attacking Petitioner's contention that the HCRC should amend its regulations to conform to the liability principles for supervisor harassment in Faragher and Ellerth. First, the Executive Director claims that adoption of the Faragher/Ellerth affirmative defense will not deter workplace harassment. Executive Director's Memorandum, p. 12. In the course of making that claim, the Executive Director mischaracterizes statements made in various law review articles to support his allegations:

> Academic studies of the effect of Faragher/Ellerth on the numbers and types of sexual harassment cases found that in the eight (8) years after Faragher/Ellerth, all available empirical evidence demonstrated that the number of harassment cases has not decreased* and that the federal courts' application of the affirmative defense undermined, rather than facilitated, the goals of deterrence and protecting employees from discriminatory harassment.**
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> * [n.26 in original] See, Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 Harv. J. Law & Gender, 1, 6 (2003) (hereinafter "Grossman, *The Culture of Compliance*") (noting that while the level of harassment has remained stagnant, the number of sexual harassment-related lawsuits and administrative filings have grown).
>
> **[n.27 in original] See David Sherwyn, et. al., *Don't Train Your Employees and Cancel Your '1-800' Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 Fordham L. Rev. 1265 (2001)(hereinafter "Sherwyn, *Don't Train Your Employees*")(analyzing the first seventy-two post Faragher/Ellerth opinions involving employers' summary

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[3] However, if the Executive Director believes that strict liability for tangible employment actions should be spelled out in the Hawaii Administrative Rules, he can certainly propose such language. The absence of a specific regulation on the subject, however, does not mean that Hawaii must follow a "simple negligence standard" as the Executive Director argues.

> judgment motions raising the affirmative defenses [sic] in response to charges of supervisory sexual harassment); Lawton, *Operating in an Empirical Vacuum* (analyzing 200 federal cases, decided between June 26, 1998, the date Faragher/Ellerth were decided, and June 30, 2003, in which the courts' decisions rested on the elements of the Faragher/Ellerth defense and evaluating how courts interpreted the two prongs of the defense.

Executive Director's Memorandum at p. 12.

As with the Executive Director's erroneous claim that Hawaii courts have not been guided by Title VII jurisprudence in interpreting Hawaii discrimination law, it is enlightening to compare his assertions with the material cited in support. The Memorandum claims that "[a]cademic studies of the effect of Faragher/Ellerth on the numbers and types of sexual harassment cases found that in the eight (8) years after Faragher/Ellerth, all available empirical evidence demonstrated that the number of harassment cases has not decreased," then cites to a single law review article by Joanna Grossman. *Id.* at p. 12, n. 26. The cited page of Grossman's law review article observes that "[a] majority of [sexual harassment] complaints involve co-worker, rather than supervisory, harassment," and states that "[w]hile survey results suggest that the level of harassment has stagnated for more than twenty years, harassment-related lawsuits and administrative charges have risen dramatically during the same period." Grossman, *The Culture of Compliance*, 26 Harv. J. Law & Gender, at p. 6 (2003). Grossman supports her claim of an increase in harassment claims by comparing the total number of sexual harassment charges filed with the EEOC in 1992 with the total number filed in 2000, rather than "in the eight years after Faragher/Ellerth" was decided in 1998 as claimed by the Executive Director. *Id.* at n. 13.

The "empirical evidence" relied upon by the Executive Director therefore consists of EEOC charge statistics which merely compare the total number of EEOC sexual harassment complaints filed in 1992 with the number filed in 2000, and notes that in comparing the two years (10,532 in 1992 versus 15,836 in 2000), there was a 50% increase. *Id.* However, even if one assumes, for purposes of argument, that a comparison of the number of sexual harassment

charges filed with the EEOC in two different years is an reliable indicator of the effectiveness of Faragher/Ellerth, the EEOC's statistics clearly support the adoption of the affirmative defense and refute the Executive Director. The number of sexual harassment charges filed with the EEOC have dropped from 15,618 in 1998 (the year Faragher and Ellerth were decided) to 12,679 in 2005, a decrease of approximately 19 percent. *See SEXUAL HARASSMENT CHARGES EEOC AND FEPAS COMBINED: FY 1992-2005*, at http://www.eeoc.gov/stats/harass.html .

The Executive Director's contention that "the federal courts' application of the affirmative defense undermined, rather than facilitated, the goals of deterrence and protecting employees from discriminatory harassment" is likewise without valid support. His Memorandum cites to two law review articles, Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense,* 13 Columb. J. Gender & L. 197 (2004), and David Sherwyn, *et. al.* , *Don't Train Your Employees and Cancel Your '1-800' Harassment Hotline*, 69 Fordham L. Rev. 1265 (2000). Lawton's article, after criticizing some federal court decisions for misconstruing the affirmative defense requirements set forth in Ellerth and Faragher, and for not using "empirical evidence" in evaluating the reasonableness of plaintiffs' failure to complain of harassment, nevertheless concludes that the affirmative defense can provide "a workable system of incentives for employers":

> Despite these shortcomings, it is still possible to interpret the affirmative defense so as to create a workable system of incentives for employers. In order to do so, however, the lower federal courts must move toward a more complex analysis of employer compliance, examining how the employer's anti-harassment policy and grievance procedure actually work in practice.

13 Columb. J. Gender & L. at 266.

Likewise, the cited article by David Sherwyn and colleagues does not advocate strict liability for supervisor sexual harassment harassment, or elimination of the Faragher/Ellerth affirmative defense. Rather, the authors contend that the second prong of the affirmative defense,

which requires proof that the complainant failed to utilize the employer's reasonable complaint procedure, should be eliminated, and argues that the defense should focus solely on the employer's preventive and corrective practices:

> One way to encourage employers to eliminate sexual harassment is to change the nature of the affirmative defense by eliminating its second prong. The affirmative defense should focus exclusively on employer conduct. To avoid vicarious liability, employers must exercise reasonable care to prevent and to stop sexual harassment. Employers should not have to prove that the employee acted unreasonably.

Sherwyn *et al.*, *Don't Train Your Employees and Cancel Your '1-800' Harassment Hotline*, 69 Fordham L. Rev. at 1299.

The Executive Director also claims that employees who are affected by supervisor harassment, but fail to utilize their employer's reasonable complaint procedures, do not obtain windfall relief because they have suffered real harm. This contention misses the point. As part of its rationale for creating the affirmative defense, the Court in Faragher and Ellerth relied in part upon the "avoidable consequences" doctrine, which holds that a victim of unlawful conduct has a duty "to use such means as are reasonable under the circumstances to avoid or minimize the damages that result" from such conduct." Faragher, 524 U.S. at 806; Ellerth, 524 U.S. at 764. Hawaii likewise recognizes the doctrine of avoidable consequences. Miyamoto v. Lum, 104 Haw. 1, 13, 84 P.3d 509, 521 (2004); Gibo v. Honolulu, 51 Haw. 299, 302-303, 459 P.2d 198, 200-2101 (1969).

In arguing that the overriding purpose of Hawaii law is remedial, the Executive Director focuses on fair treatment of employees, but is unconcerned with fairness to employers. For example, when a supervisor is not aided by his/her position of authority in committing harassment, such as when a low level supervisor who is not the complainant's supervisor (and has no authority over the complainant) engages in hostile work environment harassment, it is

unreasonable to hold an employer strictly liable for such harassment. This has been the rule in the federal courts at least since the United States Supreme Court's decision in Meritor Savings Bank v. Vinson, 477 U.S. 57, 72 (1986) ("we hold that the Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors "). If, in such situations, the employer has demonstrated a commitment to preventing and correcting unlawful harassment, has provided reasonable complaint procedures, and an employee unreasonably fails to utilize the employer's complaint procedure, holding businesses strictly liable merely compounds the unfairness to employers.

The Executive Director is mistaken in claiming that the "affirmative defense is wrong for Hawai'i because it denies compensation to victims of harassment and it unfairly shifts the burden of preventing harassment from employers to employee-victims of harassment." Executive Director's Memorandum at pp. 19-20. The affirmative defense only allows an employer to avoid liability where it can demonstrate a commitment to preventing and correcting harassment, has provided reasonable complaint procedures, and the employee has failed to utilize those procedures. Ellerth, 524 U.S. at 765, Faragher, 524 U.S. at 807. Because the employer must prove that it made reasonable efforts to prevent and correct harassment, the burden of prevention is not shifted to employees. The Executive Director is solely concerned with compensation to victims of harassment, and ignores well-recognized legal principles limiting vicarious liability and requiring plaintiffs to take reasonable measures to avoid injury, as well as the judicial acceptance of the affirmative defense by the federal judiciary and the majority of the state courts considering the issue. Again, nothing in either the state Constitution or Chapter 378 supports the Executive Director's contentions regarding employer liability for supervisor harassment.

VI. Conclusion

The Commission should reject the Executive Director's request to deny the Petition prior to a public hearing. The Executive Director's desire to preempt the public rulemaking process is not only completely unwarranted, but demonstrates an unwillingness to open the HCRC's regulations to public scrutiny and open debate. The HCRC regulations sought to be amended are contrary to federal law, have been rejected by the majority of the other states, and find no support in either the language or legislative history of Chapter 378, and yet the Executive Director claims that no sufficient reasons justify even the initiation of public rulemaking. If that is indeed the case, then the public rulemaking provisions of the State Administrative Procedures Act and the HCRC's own public rulemaking regulations merely create an empty promise.

DATED: Honolulu, Hawai'i, April 12, 2006

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